VIRGINIA LAW REGISTER

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Residence, Domicile, Tax-Dodging.

In the case of Cooper's Administrator *v.* Commonwealth of Virginia, decided at the September term of our Supreme Court of Appeals, the court rendered an important decision, which, whilst under the circumstances of the case seems justified, yet renders the way of the tax-dodger such an easy one that some legislation ought to be devised to check what is a growing evil in this state. Case after case has come under the observation of the writer, where men of means have moved into Virginia—made it to all intents and purposes their fixed habitation—but claiming residence elsewhere, and paid no taxes whatever upon their intangibles. Washington is now becoming a favorite residence of tax-evaders. These gentry rent apartments in Washington for the winter months, returning to their actual homes in March or April, claim Washington as their residence, and decline to give into the assessors any list whatever of their intangibles. They evade the tax assessor in both Washington and Virginia. Should not there be some way to reach such a class? Generally it is a class of people amply able to pay taxes.

The Cooper case was as follows:

Cooper was a student at Roanoke College, Salem, Virginia. He wooed and wedded a young lady of that town. He was a citizen of West Virginia, to which state he took his bride. Five children were born to him and his wife in West Virginia. He owned no home in that state, occupying a house owned by one of the coal companies with which he was connected. He moved to Salem, bringing his household furniture with him. He bought land and built a residence in Salem; became an officer in the Colonial Bank of Roanoke; was a director and president of the Catawba Valley Railway, extending about six miles from Salem; was an official of the Cooper Silica and Glass Co., Inc., and of

the Consumer's Fuel Co., Inc., all four Virginia Corporations. He signed three certificates for procuring charters in Virginia, in each of which his place of residence was stated to be Salem. In 1909 he procured life insurance policies and in his application gave Salem as his residence and business address. Two children were born unto him in Salem. He was president of the Salem Board of Trade. He transferred his church membership from West Virginia to Salem, and was on the Board of Stewards of the Church at Salem. His children went to the Salem public schools without paying the fees required of nonresidents. He purchased two burial lots in the cemetery at Salem, and removed the bodies of two of his children from West Virginia and interred them in the Salem Cemetery.

The circumstances, it appears to us, constitute about as strong a case for a Virginia residence as can be well made out. But Cooper always declined to permit the commissioners of revenue at Salem to assess him for capitation tax and to list his intangible property, claiming that his residence in Salem was for the purpose of educating his children and only temporary, and that his actual residence was West Virginia; that he was post-master at Coaldale, West Virginia, and by federal law required to maintain a residence there. How he fooled the government does not appear, as he spent the greater part of his time in Virginia, making trips to West Virginia every ten days or two weeks. He kept a room at "Cooper's" in West Virginia in a house on property owned by a coal company in which he was interested. He was general manager of McDowell and of Coalsdale Coal and Coke Companies and president of Mill Creek Coal and Coke Co. He was a director in two West Virginia banks. He was his father's administrator in West Virginia and never voted in Virginia. These circumstances certainly seem to justify the conclusion of the appellate court, that Cooper was not taxable in the State of Virginia, as a resident thereof.

The opinion of the court is a clear and forceful presentation of the definition of "residence" as used in the Virginia statute (Code 491 and 494 as Amended Acts 1915 P. 220) and indeed is an able elucidation of the vexed question as to the difference between "residence" and "domicile" and refers to the three lead-

ing cases on the subject; Pendleton *v.* Commonwealth, 110 Va. 229; Long *v.* Ryan, 30 Gratt. 718 and Burnes *v.* Bunting, 15 VIRGINIA LAW REGISTER, 510. The court takes the law as settled that when there is any doubt as to the intention of the party the fact of his returning to vote and of serving on juries are the evidence of a man's residence and domicile. How could this apply in the case of a woman we may ask? And the question is quite a pertinent one now. A lady of large means was before one of the local taxing boards of this state only a few weeks ago. She had been living "off and on" upon a farm in Virginia which was bequeathed to her by a relative. She paid no taxes anywhere and claimed that she had no fixed residence, flitting from one city to another as convenience dictated. She was born in Virginia, but had not lived at her birthplace for a good many years. She only lived on the farm bequeathed her to try to sell it. Now what was her residence or domicile? She, of course, had never voted, or served on a jury. Now every person must for all purposes have a legal residence or domicile somewhere. See note to Berry *v.* Wilcox, 49 Am. St. Rep. 711. Where is this lady's residence or domicile? She says she has none. She left her birthplace when an infant, has never resided anywhere for any great length of time, and has never paid any taxes anywhere? The local boards are inclined to claim that having lived longer on the farm in Virginia than anywhere else, she must be taxed here. But what will the courts say?

She has no intention of residing any place for any fixed time. She has gained no residence anywhere. She has never voted or served on a jury. Is she that happy individual who is taxless?

But is not this evil of fictitious domicile or residence, for in nine cases out of ten, it is really a fictitious one, where a party lives for years as Cooper did in Virginia—one that ought to be cured by legislation? Ought not the word "domicile" to be inserted in our statutes whenever "residence" now occurs? Or should not the law provide that when a man lives in this state under such circumstances as indicates that it is his fixed abode, he should list his intangibles with our commissioner of the revenue or produce a tax receipt showing that he paid taxes on his intangibles in the state where he claims residence? If he did not he should pay taxes in this state. Some means ought to

be devised to prevent a man using this state as his actual residence; availing himself of all the advantages for the promotion of which our own people are taxed, and then declining to bear his share of his neighbors burdens.

Wife or Child Desertion.

By an act approved March 17th, 1917, the General Assembly of this State passed an act providing "That any husband who shall without just cause desert or willfully neglect or refuse to provide for the support and maintenance of his wife; or any parents who shall desert or willfully neglect or refuse to provide for the support and maintenance of their child or children under the age of sixteen years, she or they, then and there in destitute or necessitous circumstances, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine, etc., etc. In lieu of such fine being imposed, he or she may be required to suffer a forfeiture not exceeding the sum of $500.00, and it may be directed by the Court to be paid in whole or in part to the wife or to the guardian, curator, custodian or trustee of the said minor child or children, or to some discreet person appointed by the Court or police justice to receive the same."

This is the introductory part of the very long act upon this subject which became law on March 17, 1915. The act provides that before the trial with the consent of the defendant, or at the trial should there be a plea of guilty or after conviction, the judge shall have the power to make an order which shall be subject to change by the court, from time to time as circumstances may be required, to make the defendant pay a certain sum periodically, either directly or through a probation officer to the wife, guardian, custodian or the minor child or children. This act has given rise to a great deal of criminal work in various sections of the state. It has evidently been drafted from an act passed in some state with a greater number of larger cities in it than the State of Virginia. In the cities the administration of the act is easy enough because very salutary provisions are made for the selection of probation officers and for the administration of

the law in giving the police justice the jurisdiction over the offender. It will be noted, however, that this act whilst making desertion a misdemeanor does not provide for a trial of that misdemeanor except in cities or unincorporated towns where the probation officer may be appointed by the judge of the circuit court. This act provides that the chief of police, sheriff or probation officer when, in his opinion, any person in his jurisdiction is guilty of failure to support his family may present the party before the court, charged with failure to support his wife or children. A proceedings under the act may be instituted upon oath of the wife or children supported by other evidence. The remarkable fact about the act seems to be that it provides only for trial in cities and the important question is, has a justice in the counties a right to try for a misdemeanor? Under ordinary circumstances there will be no question, for the justice has exclusive jurisdiction over misdemeanors committed in his jurisdiction; but this act provides that *in cities* where there is no juvenile or domestic relations court, justices of the peace, police justices or corporation courts and circuit courts, may try any question arising under the act. What becomes therefore of the crime when committed in the county? The act has generally been construed by the courts that the justice in the county has no jurisdiction and that the case must be tried upon indictment in the circuit court. As there is no provision for the trial of such cases by the justice of the peace in the county this part of the act should certainly be amended to confer jurisdiction upon justices in the county. The effect of the act now is to compel the deserted wife or destitute children to postpone sometimes for the period of six months the punishment of the offender or to the compelling of him to support his wife and children. There is another feature of the act which gives some difficulty. The act provides that the party may be allowed as heretofore mentioned, to pay a certain sum periodically to the wife or guardian, etc., and that recognizance shall be taken from the defendant requiring him to make his personal appearance in the court whenever ordered to do so within one year and to further comply with the terms of such order of support or to any subsequent modification thereof. The practice has been to require the defendant to pay for the term of one year a certain sum, but what is to be done when the party

answers to his recognizance within the year. We take it that the court can make this order for support as long as it sees fit. But a more important question is this. Suppose the party is convicted under the act and punished for the desertion of his wife or children, can he again be fined and punished for this desertion and non-support? We should take it that the offense is a continuing one and that if the party has been relieved by paying his fine or serving his term, he should certainly be liable to a second indictment. The case of Gray *v.* State, 105 Ga. 59; 70 American State Reports 68, held that there could be no new act of abandonment until the husband or father renewed the relationship, and therefore no second indictment. If this conclusion of the Georgia Court, is correct then the act itself is very near a farce, if the object of the act is to compel the parent to support his wife and children permanently. We commend it to our lawmakers for careful study in connection with the peculiar circumstances of our rural communities. It should certainly be so amended so that there should be no ambiguity as between cities and counties as to enforcement of the law in each and justices of the peace should be given jurisdiction to enforce the law in the county as well as in the city, of course allowing the right of appeal.

Automobiles. Degree of Care—Liability of Parent for Acts of Child.

The case of Blair *v.* Broadwater, decided at Staunton on September 20th, 1917, reiterates and reaffirms the doctrine laid down in Cohen *v.* Meador, 119 Va. 429, that "An automobile is not such a dangerous machine or agency as to make applicable to it the rules requiring extraordinary care in the use and control of instrumentalities which are dangerous per se."

This doctrine now seems to be well settled law practically throughout the United States, but the second point decided in the case, whilst supported by the weight of authority seems to us to be one in which legislation might well become necessary. As the Court very well says, "The books abound with cases for and against the parent's liability for the acts of his child in this

class of cases. The authorities are not reconcilable and it seems to us that the only safe course to pursue is to revert to first principles and adhere to ancient landmarks rather than to yield a too ready allegiance to an admittedly new principle sought to be engrafted upon the law of master and servant and principal and agent to meet supposed exigencies of new conditions incident to the advent of automobiles."

Whilst this may be true, and it is equally true that a father is not liable for the torts of his minor son simply because of paternity (Smith *v.* Jordan, 211 Mass. 269), the use of the automobile by minors has become in a great many portions of this country an absolute menace to life, limb and property. In a great many of the states licenses are refused to minors under a certain age, but we have no such law in the State of Virginia, and it is a matter of daily occurrence both in the cities and throughout the country to see these machines run by mere children, who are not only irresponsible under the law, but are really practically irresponsible from a natural standpoint. One of these children running one of these machines with the permission and consent of the parent, may kill or maim individuals, injure stock and property, and yet there can be no redress. It is the boast of the law that there is no wrong without a remedy, and yet here is one wrong for which there is no remedy, and it should either be provided that a minor running a machine with the knowledge and consent of the parent should not be under an age certainly not less than eighteen, or that the parent should be responsible for all injuries by a minor child using a machine under such circumstances. It is true that new principles ought not to be engrafted upon old well-settled law, but would the law be a progressive science if it could not in some way meet the new principles brought into existance by automobiles, aeroplanes and machines of this character, the possibility of danger from which was never dreamed of when precedents were made.

Damages for Trespasses by Animals. Is a Fowl an Animal?

The last question has been answered in the affirmative by a great many of the courts and in a very excellent annotation to the case of Holcomb *v.* VanZylen, 35 Am. & Eng. Ann. Cas. (Ann. Cas. 1915A) it is shown that a fowl has generally been treated as an animal in laws relating to cruelty to animals, and in the case annotated the Michigan Supreme Court held that an animal is an animate being not human, endowed with the power of voluntary motion.

It will surprise a good many of our readers, therefore when we state that section 2042 of our Code, headed, "Damages for Trespass by Animals," cannot be construed to allow damages for trespasses by fowls, because the language is "If any horses, mules, cattle, hogs, sheep or goats shall enter, etc., the owner, etc., shall be liable for damages etc., etc." This language of course, *ex vi termini,* expressly excludes damages done by fowls, no matter to what extent. The attention of the editor was sharply brought to this condition of the law by a case in which a flock of turkeys and chickens practically destroyed five or six acres of corn just after it had been planted, which was so far off from the residence of the owner of the land that he was not able to guard it from these fowls, which being in large numbers, ate up the corn about as fast as it was planted, and the owner of the fowls positively declined to keep them up. Here was another wrong without a remedy, and should not the fowl be added to the members of the animal kingdom included in Section 2042?

Dead Bodies. Interference with Right of Relatives to Bury Body.

The case of Awtrey *v.* Norfolk & Western Railway Company, decided at Staunton, Sept. 20th, 1917, is one very curious in more respects than one, and while the court states that it is well settled that the near relatives of a deceased person have a legal right to the solace of burying the body and that any interference with that right, whether by mutilation of the body after death, or by withholding it from the relatives, is actionable; yet

the decision of the court is, that where a party was killed by railroad and the body found in a mutilated condition, taken charge of by the coroner, and in pursuance of the statute buried by him, that the railway company was in no way responsible in damages for their failure to collect and prepare for burial the dismembered portions of the body of the plaintiff's son, or for their failure to notify plaintiff of the son's death and thus depriving her of the solace and comfort of properly burying the same. It seems to us there can be no question as to the decision of this case, especially in view of the fact that the real grievance of the parent was mental anguish. The coroner buried the body in pursuance of the statute, notified the mother of the son's death, and she ultimately buried the body. Mutilation of the body of course was coincident with the killing and was not similar to a case in which a dead body was wrongfully dissected.